

Sir JAMES GRAY, Appellant.

James, Duke of Hamilton,
Charles, Earl of Selkirk, } Respondents.
Alexander Gawne.

The Appellant's C A S E.

March 12. 1702.

THE Respondent, the Duke of Hamilton, entered into a Bond, in England, according to the English Form, for Payment of 1000*l.* and Interest at six per Cent. to the Respondent Gawne, who towards Satisfaction of 1500*l.* by him owing to the Appellant, the 18th of July 1704. assigned over the said Bond to him; which Assignment was also drawn and executed in England, according to the English Form.

Septem. 22. 1705.
The Dukes first Letter.

The Appellant, having by a Letter given the Duke Notice of this Assignment, his Grace was pleased to write an Answer thereto with his own Hand; whereby he acknowledges he had Notice of the Assignment, Declares he could not think himself in better Hands; Promises Payment of the Interest punctually, and of the Principal, as soon as he could; And desires not to be pressed, till he was in a Condition to pay it: And then he should be more willing to Pay, than the Appellant to receive it.

April 5. 1706.

After which the Appellant writ another Letter to his Grace, who returned an Answer thereto, all Written with his own Hand, and then dated; whereby his Grace Corroborates his former Letter, Promises Payment of the Interest, then Due, as soon as the Appellant pleased, and of the growing Interest to the Appellant's Content.

June 14. 1706.

By a third Letter, dated the 19th of April 1708. his Grace excuses his Non-Payment, by Reason of the Scarcity of Money. An Arrestment (which is in the Nature of an Attachment) was made in North-Brittain, by the Respondent, the Earl of Selkirk, of this Debt and Interest in his Grace's Hands (the Earl claiming a great Debt from Gawne;) Upon which, and upon the Duke's Refusal to pay the Money.

The Appellant commenced his Suit before the Lords of Council and Session, against the Duke to compel a Satisfaction of the Principal Money, and Interest due upon the Bond.

And the Earl of Selkirk commenced his Suit against the Duke, and against the Appellant, and Respondent Gawne; whereby he claims 6500*l.* as due to him from Gawne, and prays, That the Duke may pay him the Money towards Satisfaction of Gawne's Debt; The Earl insisting, that he was Entitled thereto by the Arrestment, and that the Assignment was of no Effect by the Law of Scotland, because it was not intimated before the Arrestment, that is, solemnly shewn to the Duke before a Notary Publick, and two Witnesses, and an Instrument made thereupon.

January 1. 1708.

Both Causes were heard together when the Appellant (*inter alia*) insisted, That no such Intimation was necessary, because his Grace not only knew and approved of the Assignment, but promised punctual Payment of the Interest, and of the Principal, as soon as he conveniently could; and in the mean time desired he might not be pressed to pay the same.

Whereupon the Court found, That the Duke's Letters were Equivalent to an Intimation, and that the Dates thereof were Prior to the Earl's Arrestment: And therefore they Preferred the Appellant, and Decreed against the Earl.

Febr. 28. 1708.

Before this Decree was drawn up or extracted, the Earl petitioned the Court further to consider of the Matter, and to give him the Preference; whereto the Appellant put in his Answer.

The Causes were again heard, when the Court referred it to the Lord Minto Judge-Ordinary, to hear the Parties on this Point (*viz.*) Whether these Holograph Letters do not prove their Dates against the Earl.

The Lord Minto made *Advisandum*, or referred the Causes back to the whole Court.

July 22. 1708.

The Causes were again heard, and the Lord Minto reported the Case; and the Appellant insisted, That the Bond and Assignment being in English Form, needed no Intimation; but this was rejected, in regard the Process was depending before the Scotch Judicatories, and to be judged by their Law. And thereupon the Court found that the Letters did not prove their Date nor supply the want of an Intimation in prejudice of the Earl, who was a third Party; and therefore they gave him the Preference and decreed the Duke to pay him the Money.

July 31. 1708.

Upon which the Appellant Petitioned the Court, and thereby insisted that the Letters sufficiently proved their Dates, inasmuch as it could not be presumed that a Person of his Graces Quality and Honour would antedate his Letters, to defeat his own Brother. But if such Presumption were possible, the Appellant offered to prove by Witnesses that the Letters were by him received and actually seen in his Hands long before the Arrestment. And further insisted, That by the Laws of Scotland, these Letters containing a Consent unto, or Approbation of the Assignment, together with a Promise or Obligation, to Pay the Money, there was no need of an Intimation; and therefore prayed the Court to consider further of their Order and to give the Appellant the preference: To which Petition the Duke and Earl put in their Answers.

Upon reading of which Petition and Answers the Court refused to Grant the Appellant a Commission as desired in the Petition, adhered to their former Decree, and ordered the same to be Extracted, upon which the Appellant as usual, duly protested for remedy of Law to the British Parliament.

By which Decrees of 22^d. and 31st. July 1708. the Appellant is Aggrieved, and Hopeth the same shall be Reversed.

Reasons to Reverse the Decree.

Foubert cont. Turst
Decem. 11. 1703.

For that the Matters before-mentioned having been Transacted in England, between Parties then, and for some Years before, there Inhabiting, and the Bond and Assignment being in the English Form, there was no occasion, in this Case of the Ceremony, of giving his Grace Intimation of the Assignment; according to the Form used in Scotland. And by the Laws of Nations, Bonds so assigned, and other Personal Contracts, may be sued ubique, and are always determined according to the Custom or Constitution of the place where they were entered into: And so it hath been adjudged by the House of Peers in England, between French Refugees. And were this otherwise, or should one Country not have regard to the Laws and Customs of another, Merchants and others, by shifting Countries, would elude the Force of their own Bonds and Agreements: And in several Instances the Lords of Council and Session have held Plea of Bonds entered into, according to the Form used in Holland and other Foreign Countries, and therein have followed the Custom of the Place where the Contract was made.

II.

For that if such Intimation was necessary (which the Appellant insists it was not) yet the Defect thereof was sufficiently supplied by his Grace's Letters; And by the Laws of Scotland and the Practice of the Court in other Cases, such Letters have been held equivalent to an Intimation, even as to Matters transacted there; which fully appears from several Presidents and Authorities.

III.

For that by the date of his Grace's Letters, they appear to be written many Months before the Earl's Arrestment: And it cannot, nor ought to be presumed, that a Person of his Grace's Honour and Quality would Antedate Letters to defraud his own Brother. But if the Court of Session had thought that possible, they ought to have granted the Appellant a Commission according to the desire in his Petition, in order to prove, that the Letters were received by him in London many Months before the Earl's Arrestment: It being allowable by the Laws of Scotland to examine Witnesses to prove the date of Holograph Writings, where the date is disputed.

Wherefore the Appellant humbly Hopeth, That the said Decrees shall be Reversed, and that he shall have such Relief in the Premises as shall be Just.

J. Jekyll,

Sim. Harcourt.